

## Terrorism and National Security Concerns

- **Does the Act allow disclosure of information if necessary to prevent terrorism or harm to national security?** Yes. The Act permits disclosure when necessary to prevent an act of terrorism against the United States and our allies or to prevent other specified harm to national security. This exception provides broad protection for national security; a broader exception would swallow the rule.
- **What if the reporter has information that would help apprehend the source of a past terrorist attack?** Information about a past terrorist attack will often be necessary to prevent a future terrorist attack, and thus will be available under the terrorism or national security exception.
- **Is the government's burden of proof stringent?** The government need only satisfy these exceptions by a preponderance of evidence – which requires only a showing that the harm is “more likely than not.” This standard is less restrictive than the DOJ's own guidelines.
- **Will the Act delay anti-terrorism investigations and operations?** The Act doesn't change the procedures that govern subpoenas to reporters. When a subpoena is served, the reporter may file a motion to quash; these motions proceed quickly and the government can make classified submissions to the court in camera, if necessary. Courts regularly expedite proceedings to accommodate exigent circumstances and especially when national security is at stake.
- **Does the Act prevent the government from identifying people who leak national security secrets?** The Act enables the government to identify the source of classified information – so long as the information was classified properly and has harmed or will harm national security. Because experts believe that up to 90 percent of classified information has been classified improperly, the Act protects sources who leak improperly classified information that exposes government wrongdoing.
- **Does the exception to the crime-fraud exception protect all government leakers?** Leakers are protected only when the leaked information was classified improperly and did not harm national security.
  - The **crime-fraud exception** (Section 2(d)), which generally requires disclosure of information that a reporter obtained by witnessing a crime, does not require disclosure if the crime witnessed by the reporter was the leak of the information itself – otherwise, disclosure would be required every time a reporter received a classified leak. (Public interest stories with classified information: Abu Ghraib, fraud in defense industry, federal workers in Kentucky uranium plant exposed to excessive amounts of uranium and plutonium.)
  - But the **classified-leak provision** (Section 2(a)(3)(D)) permits disclosure if necessary to investigate or prosecute the leak of properly classified information that has harmed or would harm national security.
- **Doesn't the public-interest balancing test impose an unnecessary hurdle for the government?** The public interest balancing test provides a safety valve; courts can use their discretion to ensure that the government cannot override the privilege by going to court merely uttering the words “we need it for national security.” Courts have long applied public interest balancing tests in national security cases – including in cases in which prosecutors have sought to identify confidential sources – and typically rule for the government when it invokes legitimate national security concerns.